In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
CARL L. MICHALAK	)	
(Chapter 7 Case Number 01-42312)	)	Number 01-4151
	)	
Debtor	)	
	)	
	)	
	)	
CYNTHIA LEE	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	
	)	
CARL L. MICHALAK	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER ON MOTION FOR RECONSIDERATION

On September 23, 2002, this Court issued a Memorandum and Order ("Opinion") declaring certain obligations of Carl L. Michalak ("Debtor") to his former wife, Cynthia Lee ("Plaintiff"), non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(5) and 523(a)(15). Debtor now moves the Court to reconsider and modify the Opinion and asserts four bases for modification:

1. The Order does not address Mr. Michalak's motion to dismiss Ms. Lee's original complaint on the grounds that it failed

to state a claim.

> 2. The Order makes findings of fact which show that Mr. Michalak is not, out of current income or assets, able to indemnify Ms. Lee against the $41,000 of credit card debts, whether or not the indemnification is deemed to include accrued and accruing interest on those debts. Having made that finding of fact, the Court reaches the inconsistent conclusion of law that Mr. Michalak can afford to pay $41,000.00.
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> 3. In its conclusions of law, the Order *sua sponte* raised a § 523(a)(6) issue of fact and law that the Plaintiff never raised regarding the Debtor's use of funds from the account of Lee-Michaels, Inc.
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> 4. The Court has mistakenly changed the allocation of the § 523(a)(15) burden of proof in which the Court announced in *In re Smith*, 218 B.R. 254 (Bankr. S.D. Ga. 1997).

Debtor's Mot. for Reconsideration (Oct. 4, 2002).

Debtor's third reason is easily disposed of. Although the opinion alluded to subsection (a)(6), it did not deny discharge under that subsection or, for that matter, any other subsection of § 523 other than (a)(5) and (a)(15). No § 523(a)(6) issue has been raised in this case, *sua sponte* by the Court or otherwise by the parties.

Because my decision regarding the burdens of proof and production in an § 523(a)(15) determination substantially affects my ultimate decisions with respect to Debtor's remaining reasons, I turn next to Debtor's assertion that the burden of proof is incorrectly allocated.

A. Burden of Proof Standards in § 523(a)(15)

Section 523(a)(15) excepts certain debts from a general discharge in bankruptcy:

> A discharge under section 727 . . . does not discharge an individual debtor from any debt–
> . . .
> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record . . . *unless* –
>
> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
>
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a . . . former spouse . . . of the debtor[.]

§ 523(a)(15) (emphasis added). The language and structure of this subsection indicate that Congress intended *all* debts incurred in connection with divorce or separation to be excluded from routine discharge in bankruptcy. Where a former spouse establishes that the debts at issue arose in connection with the parties' divorce or separation, a presumption of nondischargeability arises. *See* Opinion, at 14-15.

In construing the statute for purposes of assigning burdens of proof and production, the word "*unless*" which precedes subsections (A) and (B) of § 523(a)(15) is significant. Had subsection (a)(15) stated that such debts were not to be discharged "*provided that*" (or "*so long as*" or "*only if*" or "*if*") the debtor has the ability to pay or the benefit to the debtor outweighs the harm to the non-debtor spouse, then subsections (A) and (B) would necessarily constitute additional conditions which the party seeking nondischargeability must satisfy. The use of "*unless,*" however,

indicates that subsections (A) and (B) do not provide additional elements required to establish nondischargeability; rather, they set out alternative circumstances the proof of either of which negates the (a)(15) exception.[1] Subsections (A) and (B) thus constitute *potential* obstacles to nondischargeability. Lacking proof that one of the alternative "*unless*" conditions is satisfied, the presumption of nondischargeability remains intact, and the debt at issue may not be discharged. *See* Opinion at 14-15.[2]

As the party seeking a nondischargeability determination under § 523 (a)(15), Ms. Lee, the non-debtor spouse, was required to prove by a preponderance of evidence that the debts sought to be excepted from discharge arose either "in the course of a divorce or separation" or "in connection with a separation agreement, divorce decree or other order of a court of record," without regard to whether those debts were actually in the nature of support, *see* §§ 523(a)(5), 523(a)(15). Because Ms. Lee conclusively proved that all debts at issue arose in connection with the parties' divorce decree, the (a)(15) exception was applicable "*unless"* a preponderant showing was made

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[1] Compare the construction of § 523(a)(5), which contains the phrase "*but not to the extent that*" preceding (A) and (B). In the context of (a)(5), that phrase itself constitutes language of exclusion; thus, the *creditor* asserting nondischargeability under subsection (a)(5) bears the burden to show that one of the alternative conditions, (A) or (B), does *not* apply.

[2] This Court has alluded to the shifting burden required by subsections (a)(15)(A) and (a)(15)(B). *See* Iler v. Iler (In re Iler), Adv. No. 96-4050, Ch. 7 Case No. 95-42815, slip op. at 9 (Bankr. S.D. Ga. Sept. 4, 1997) ("Under [subsection (A)], an obligation arising from a division of property may be discharged *if a debtor can demonstrate* that he does not have the ability to pay . . . . If the debtor possesses the 'ability to pay,' *the debtor still may attempt to discharge* the debt pursuant to [subsection (B)]. " (emphases added)).

Numerous courts have held that the debtor bears the burden of showing that (A) or (B) should apply. *See, e.g.*, Fellner v. Fellner (In re Fellner), 256 B.R. 898, 902-03 (B.A.P. 8th Cir. 2001) (characterizing (A) and (B) as "defenses" to be proven by debtor); Hart v. Molino (In re Molino), 225 B.R. 904, 907 (B.A.P. 6th Cir. 1998) (characterizing (A) and (B) as "exceptions to nondischargeability" which debtor bears burden to prove); In re Crosswhite, 148 F.3d 879, 884-85 (7th Cir.1998) (noting that "clear shift in the burden of proof" to debtor "is logical and reasonable"); Gamble v. Gamble (In re Gamble), 143 F.3d 223, 226 (5th Cir.1998) (noting that debtor bearing burden regarding application of (A) or (B) "accords with traditional notions of the prima facie case and affirmative defense, is in line with the rulings of the majority of courts to have considered the issue, and is completely consistent with the statutory language" (internal citations omitted)); Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 140 (B.A.P. 9th Cir. 1997) (noting that use of "[t]he word 'unless' . . . . creates an exception within an exception" that debtor must prove); Royer v. Smith (In re Smith), 278 B.R. 253, 260-61 (Bankr. M.D. Ga. 2001) (noting burden-of-production shift to debtor to prove (A) or (B)).

either that Mr. Michalak could not pay the debt from his disposable income or that discharging the debt would have benefitted him more than it would have harmed Ms. Lee.

Therefore, I reaffirm my holding that where the objecting party has proven by a preponderance of evidence that debts were incurred as specified in (a)(15), and the debtor then fails to prove that either (A) or (B) applies, the debts may not be discharged.

B. Failure to State a Claim

The Court entertained Debtor's Motion to Dismiss pursuant to Federal Rule 12(b)(6) at a hearing on January 16, 2002, and ruled that Plaintiff's Complaint was sufficient to state a claim. Debtor properly preserved the issue and now reasserts that motion. Findings of fact and conclusions of law are unnecessary in ruling on a Rule 12(b)(6) motion. *See* Fed. R. Bankr. P. 7052(a). Nevertheless, because Debtor's counsel requests a written decision, I make the following Findings of Fact and Conclusions of Law with respect to my bench ruling denying Debtor's Motion to Dismiss.

1. Findings of Fact Relevant to Debtor's 12(b)(6) Motion

Plaintiff filed her original Complaint on the last date permitted for filing claims ("the bar date") to determine dischargeability for claims subject to Bankruptcy Rule 4007(c). *See* Compl. ¶ 1. The debts listed in the original Complaint were: (1) a $36,000 annual payment, plus cost-of-living increases, for ten years; (2) a $14,000 lump sum payment to be paid within two years of the settlement agreement; (3) a $20,000 payment representing "inheritance monies" left to Plaintiff by her deceased mother; (4) Plaintiff's health insurance payments for ten years; (5) vehicle and insurance payments for four years; and (6) all credit card debts, mortgages, and personal loans accrued during

the parties' marriage. Id. ¶¶ 4-7. The Complaint identified, as the source of the debts, the divorce decree, including a settlement agreement between Debtor and Plaintiff. *See* id. ¶¶ 2-10.

The prayer for relief in the Complaint requested "that the debts owed to Plaintiff be found to be exempted from discharge pursuant to 11 U.S.C. [§] 523," id. The facts asserted in paragraphs 1 through 9 made apparent that Plaintiff was asserting claims arising out of debts connected with the parties' separation agreement and divorce decree. *See* Debtor's Br. in Supp. of Mot. for Reconsideration [hereinafter "Supp. Br."], at 2 (reciting that paragraphs paraphrasing parties' separation agreement were included "apparently to show that [Plaintiff] asserts claims against [Debtor] which arise out of the separation agreement and divorce decree"); Debtor's Mot. to Dismiss ¶ 1 (Dec. 3, 2001) [hereinafter "Mot. to Dismiss"]. The confusion which prompted Debtor's motion to dismiss arose out of Plaintiff's attempt to specify subsections of § 523(a) in paragraph 11, *see* Compl. ¶ 11 (citing "523(a)(1)(C)(5)" and "523(a)(1)(C)(5)(B)"), which referred to "two nonexistent" subsections of the Bankruptcy Code," Mot. to Dismiss ¶ 6. Debtor's counsel, noting the flaws in paragraph 11 as well as the irrelevance of facts asserted in paragraph 10 to a prayer for relief under § 523, timely moved for dismissal of Plaintiff's Complaint in its entirety for failure to state a claim upon which relief can be granted, *see* Fed. R. Bankr. P. 7012(b) (incorporating Fed. R. Civ. P. 12(b)(6)).

The Court allowed Plaintiff to file an amendment to the Complaint. Her amendment "incorporate[d] by reference [p]aragraphs 1 through 9 of [her] initial Complaint as if re-alleged herein verbatim." Am. Compl. ¶ 1. The amendment also struck paragraph 10 from the Complaint and reworded and augmented the assertions in paragraph 11:

> All obligations of the Respondent/Debtor owed to the Movant under the Marital Settlement Agreement are in the nature of alimony, maintenance or support and are therefore non-dischargeable under 11 U.S.C. § 523(a)(3)(5)(B). Furthermore, these obligations were incurred by the Respondent/Debtor in the course of a divorce and/or in a separation agreement and *the Respondent/Debtor has the ability to pay these obligations from his income and property not necessary to be expended for support of Respondent/Debtor or to continue his business and the discharge of said debt would work a greater hardship on the Movant than on the Respondent/Debtor.*

Am. Compl. (emphasis added).[3]

Debtor, contending that even in this era of notice pleading, if the original complaint fails to state a claim, there is nothing for a plaintiff to amend, Supp. Br., at p. 4, renewed his Motion to Dismiss. He asserts that (1) the Court "allowed the Plaintiff to amend her Complaint after the bar date to replace her original *factual* allegations with a whole set of entirely new factual allegations," id. (emphasis in original), and (2) those "new factual allegations" were added to establish a new claim based on § 523(a)(15), which "in effect allowed the Plaintiff to violate the bar date" as to any portion of her amended Complaint based on § 523(a)(15), id.

2. Conclusions of Law Regarding Debtor's 12(a)(6) Motion

A Chapter 7 debtor "shall be discharged from a debt of a kind specified in [§ 523(a)(15)] unless, on request of the creditor to whom such debt is owed, . . . the court determines such debt to be excepted from discharge under paragraph [(a)(15)]." § 523(c)(1). A complaint to

[3] The substituted paragraph was also flawed, in that the §523(a) citation incorrectly referenced subsection (3).

determine dischargeability of an (a)(15) debt "shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." Fed. R. Bankr. P. 4007(c).[4] Unless a creditor with actual notice of the bankruptcy files, prior to the bar date, a motion to extend that time, the bankruptcy court has no discretion to extend the period for filing of a dischargeability complaint. Byrd v. Alton (In re Alton), 837 F.2d 457, 458-61 (11th Cir. 1988); however, an amendment to a claim is permitted to "relate back" to a timely filed claim where "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c) (incorporated by Fed. B. Bankr. P. 7015).

Plaintiff's original Complaint was timely filed as to the listed debts, and the 60-day limitation period of Bankruptcy Rule 4007(c) does not preclude a challenge to their dischargeability. The Alton decision served only to preclude the late filing of a dischargeability complaint where *no complaint* has been timely filed and no request for an extension of time has been made prior to the expiration of the time set out in Bankruptcy Rule 4007(c). *See* Alton, 837 F.2d at 259-60. It did not, however, alter the notice-pleading standard for a timely-filed complaint.

The remaining issues are: (1) whether the assertions in the original Complaint were sufficient to state a claim with respect to their dischargeability; (2) whether the language in the original Complaint was sufficient to ground Plaintiff's claims in subsection (a)(15); and, if not, (3) whether Plaintiff's amendment should be allowed to "relate back" to the date of the original Complaint for purposes of basing certain of Plaintiff's claims in subsection (a)(15).

[4] The 60-day limitation period does not apply to debts that are dischargeable under subsection (a)(5).

a. Sufficiency Issues

Under federal "notice" pleading requirements, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded." Fed. R. Civ. P. 8 (a)(2)-(3) (incorporated by Fed. R. Bankr. P. 7008(a) in bankruptcy adversary proceedings). The allegations in the complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957). "Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues."[5] Id. at 47-48.

In this case, Plaintiff originally sought relief under, simply, "11 U.S.C. 523." Her Complaint, in addition to specifically listing the debts, *see supra* p.6, also recited that those debts were incurred pursuant to the parties' marital settlement agreement and divorce decree, *see* Compl. ¶¶ 2, 11. Notwithstanding the error-riddled references to various subsections of § 523 in paragraph 11, the facts as alleged in the Complaint, together with the prayer for relief based on "11 U.S.C. [§] 523," were sufficient in "showing that the pleader [was] entitled to relief," Fed. R. Civ. P. 8(a)(2).

[5] In this case, a motion to strike paragraph 10 and a motion for a more definite statement regarding paragraph 11 were choices available to Debtor. *See* Fed. R. Civ. P. 12(f) ("Upon motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any . . . immaterial . . . matter."); Fed. R. Civ. P. 12(e) ("If a pleading . . . is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement . . . . point[ing] out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed . . ., the court may strike the pleading . . . or make such order as it deems just.").

Furthermore, the original Complaint was sufficient to show that the relief was based on subsections (a)(5) and (a)(15) of § 523(a). First, with respect to subsection (a)(5), the Complaint contained the following recital which pointed to that subsection by quoting, verbatim, the language of subsection (a)(5)(B): "*[S]uch debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support*," Compl. ¶ 11.

Second, the original Complaint was also sufficient to plead a *prima facie* case under § 523(a)(15) *and* to give Debtor notice of that asserted basis for relief. In light of the burden required in a § 523(a)(15) determination, *see* Section A, *supra,* Plaintiff needed only to prove that the debts sought to be excepted from discharge arose in connection with the parties' divorce. Debtor admits that the facts asserted in the Complaint established that the debts arose out of the parties' separation agreement and divorce decree. *See* Mot. to Dismiss ¶ 1 ("The first 9 paragraphs . . . purport only to establish that the Plaintiff's claims against the Debtor, her ex-husband, arise out of the parties' separation agreement."); Supp. Br. at 2 ("The first 9 paragraphs . . . paraphrase the parties' separation agreement and divorce decree, apparently to show that she asserts claims . . . which arose out of the separation and divorce decree.").

b. Relation Back Issue

A party may amend a complaint after the bar date has passed "only by leave of court or by written consent of the adverse party[,] and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a) (incorporated by Fed. R. Bankr. P. 7015 in bankruptcy proceedings). Provided that a claim "asserted in the amended pleading arose out of the conduct, transaction, or occurrence set

forth or attempted to be set forth in the original pleading," the amended claim relates back to the date on which the original pleading was filed. Fed. R. Civ. P. 15(c).

"The major consideration in deciding whether an amendment relates back is whether adequate notice is given to the opposing party by the general fact situation alleged in the original pleading." Holdridge v. Heyer-Schulte Corp. of Santa Barbara, 440 F.Supp. 1088, 1092 (N.D.N.Y. 1977) (citing Rosenberg v. Martin, 478 F.2d 520, 526 (2d Cir. 1973); Williams v. United States, 405 F.2d 234, 236-37 (5th Cir. 1968)). Thus, "[i]n determining whether an amended cause of action is to relate back, the emphasis is not on the legal theory of the action, but whether the specified conduct of the defendant, upon which the plaintiff is relying to enforce his amended claim, is identifiable with the original claim." Gelling v. Dean (In re Dean), 11 B.R. 542, 545 (B.A.P. 9th Cir. 1981) (citing 3 Moore's Federal Practice P 15.15(3), pp. 15-196-205 (2d ed. 1980)), *affirmed by* 687 F.2d 307 (9th Cir. 1982); *see also* CIT Group/Factoring Mfrs. Hanover, Inc. v. Srour (In re Srour), 138 B.R. 413, 418 (Bankr. S.D.N.Y. 1992) ("Under Rule 15(c), if the original pleading sufficiently indicates the factual situation out of which the claim arises, the amendment will relate back. However, an amendment which states an entirely new claim for relief based upon a different set of facts, will not relate back." (citing, *inter alia*: Holmes v. Greyhound Lines, Inc., 757 F.2d 1563, 1566 (5th Cir. 1985); Kelcey v. Tankers Co., 217 F.2d 541, 543 (2d Cir. 1954); Holdridge, 440 F.Supp. at 1093; Guar. Corp. v. Fondren (In re Fondren), 119 B.R. 101, 104 (Bankr.S.D.Miss.1990))); *cf. also* Magno v. Rigsby (In re Magno), 216 B.R. 34, 40-41 (B.A.P. 9th Cir. 1997) (holding that § 523(a)(6) basis for relief added as amendment did not relate back to original claim which failed to allege facts as proof of elements required under (a)(6), even though same judgment debt was alleged in both complaints). Therefore, to determine whether an amendment relates back under Rule 15(c), it is necessary to

examine the similarity between the *facts* set forth in the original complaint and to examine their relationship to the amendment.

Here, the facts as alleged in paragraphs 1 through 9 and the prayer for relief under § 523 in the original Complaint were sufficient to state a claim seeking dischargeability of debts incurred in connection with a divorce, while they were clearly insufficient to state a claim under any other § 523 subsections; therefore, in terms of notice pleading, Debtor and the Court were able to perceive the relationship between the prayer for relief in the original Complaint, as supported by the factual assertions, and the attempt to point to subsection (a)(15) in the amendment, as supported by the identical factual assertions.

Debtor's assertion that the Court "allowed the Plaintiff to amend her Complaint after the bar date to replace her original *factual* allegations with a whole set of entirely new factual allegations" is incorrect. Plaintiff's amended Complaint asserted no new factual allegations. The amendment removed certain irrelevant facts by omitting paragraph 10, attempted to correct–albeit imperfectly–certain "typographical" errors, and added additional language attempting to ground a portion of Plaintiff's claim more specifically in subsection (a)(15) of § 523. What the amendment clearly did *not* do, however, was to replace the original factual allegations or to add additional facts; indeed, the amendment expressly incorporated by reference, verbatim, the facts as alleged in the original Complaint. The added assertion was a statement that Debtor "has the ability to pay these obligations from his income and property not necessary to be expended for support of [Debtor] or to continue his business and the discharge of said debt would work a greater hardship on [Plaintiff] than on [Debtor]." This assertion, while entirely "new," was purely conclusory rather than factual and, for

that matter, utterly superfluous to a "short and plain statement of the claim" required of a non-debtor spouse in establishing nondischargeability under § 523(a)(15).[6] *See, e.g.,* Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992) (noting that mere conclusory allegations are insufficient to avoid dismissal).

Plaintiff's amendment therefore served, at most, to point more specifically to subsection (a)(15) as a legal basis for her § 523 prayer for relief. In that no new facts were asserted and Debtor had actual notice that the facts were asserted for the purpose of showing that the debts arose in connection with the parties' divorce, the amendment relates back to the original Complaint.

c. Conclusion

In this case, Plaintiff's original Complaint specifically listed the debts, identified them as debts arising from the parties' divorce decree, asserted that those debts were dischargeable under § 523, and recited language contained in subsections (a)(5) and (a)(15). Plaintiff's error was the failure to correctly identify the subsections. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. " Conley, 355 U.S. at 48. Rather, "[a]ll pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8 (f); *see also* Conley, 355 U.S. at 48. In light of my reaffirmation of the burdens of proof and

[6] *See* discussion, *supra* at pp. 3-5 (discussing plaintiff's burden in § 523(a)(15) determination). Had Plaintiff been required to plead facts in support of the *nonapplicability* of subsections (A) and (B) in a § 523(a)(15) determination, a conclusory assertion such as Plaintiff's would not have constituted a sufficient pleading to support (a)(15) dischargeability, and Debtor's Motion to Dismiss may have been sustainable. In light of my holding as to the appropriate burdens of proof and production in such a determination, however, Plaintiff was not required to plead such facts.

production in a § 523(a)(15) determination and my previous holdings as to the burden of proof in a § 523(a)(5) determination, *see, e.g.*, Opinion at 8-9 (quoting Smith v. Smith (In re Gene Kyle Smith), Adv. Nos. 96-2054 & 96-2085, Ch. 7 Case No. 95-20524 (Bankr. S.D. Ga. Dec. 30, 1997)), and because I find that substantial justice would not be served by dismissing the claim, I reaffirm that Plaintiff pled facts sufficient to state claims under 11 U.S.C. §§ 523(a)(5) and (a)(15).

C. Debtor's Ability to Pay

Debtor's remaining asserted reason for urging modification of the Opinion is that with respect to the $41,000.00 debt, the Court's Conclusions of Law were inconsistent with its Findings of Fact. In particular, Debtor points to my findings that Debtor's budget for personal expenses revealed no significant excess income, that a little more than one-half of Debtor's business's 2001 gross profit went to Plaintiff in support obligations, and that Debtor's business may improve in the future but that improvement is certainly not guaranteed.

I decline to reconsider my decision as to § 523(a)(15)(B). After consideration of the evidence, I concluded that the parties' respective needs appeared to balance out. I decline to modify the finding that there was no preponderance of evidence showing that the benefit to Debtor would exceed the detriment to Plaintiff if the debt were discharged.

I also decline to modify my determination under § 523(a)(15)(A). That subsection provides that if "the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures

necessary for the continuation, preservation, and operation of such business," then the debt may be discharged.

With respect to Debtor's business considerations, I concluded in the Opinion that the evidence was insufficient to show that Debtor's business requires, for its "continuation, preservation, and operation," the funds that he is obligated to pay Plaintiff. I hereby reaffirm that finding.

My decision with respect to Debtor's personal support needs was not made without a substantial measure of consideration of the evidence before me. The evidence showed that Debtor's health is frail but stable, that he has expertise in environmental engineering that may be used in jobs other than his current business, and that he supports a non-dependant live-in companion twenty years his junior and her child. No quantitative evidence was presented to show the amount of Debtor's earnings that he expends on the two non-dependents, nor was the cost of insurance–which Debtor asserts that he currently cannot afford–made known. Without sufficient evidence to merit a conclusion that Debtor *himself* actually *requires* more income than he is making, Debtor failed to show that he does not have the ability to pay his debt to Plaintiff from income that is "not reasonably necessary" for his own support. The Court can only conclude that Debtor has some excess income, in light of his contributing to the support of two non-dependants.

Pursuant to the above discussion, Debtor's Motion for Reconsideration IS DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of November, 2002.